UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS, Plaintiff,	:	**ECF CASE**
- v.-	:	05 Civ. 5468 (JSR)
UNITED STATES DEPARTMENT OF DEFENSE, Defendant.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT'S PARTIAL MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO WITHHOLDINGS FROM SAMPLE PRE-ARB TRANSFER/RELEASE DOCUMENTS

MICHAEL J. GARCIA
United States Attorney for the Southern District
of New York
Attorney for Defendant
86 Chambers Street
New York, New York 10007
Telephone: (212) 637-2709/2743
Facsimile: (212) 637-2702/2686

SARAH S. NORMAND
ELIZABETH WOLSTEIN
Assistant United States Attorneys

- Of Counsel -

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Defendant the U.S. Department of Defense ("DOD") respectfully submits this reply memorandum of law in further support of its motion for partial summary judgment with respect to DOD's withholdings from the sample pre-ARB transfer/release documents.

POINT I

THE INFORMATION WITHHELD FROM THE SAMPLE PRE-ARB TRANSFER/RELEASE DOCUMENTS IS EXEMPT FROM DISCLOSURE UNDER FOIA

Plaintiff the Associated Press's ("AP's") opposition fails to address the bulk of the factual record submitted by DOD, and raises no viable challenge to DOD's withholdings from the sample pre-ARB transfer/release documents.

A. Exemption 1 Protects Classified Background Information About Detainees

DOD's declarations establish that it met the procedural and substantive requirements for classification of two categories of information withheld from the sample pre-ARB documents under Exemption 1: (1) background information about individual detainees, and (2) conclusions reached by analysts regarding the intelligence and law enforcement value and threat level of individual detainees. See Harris Decl. ¶¶ 14-25, 29; Smith Decl. ¶¶ 10-11.[1] Despite the rhetoric in its brief, AP does little to challenge the justifications underlying DOD's Exemption 1 withholdings. See Opp. at 17-18 (specific arguments limited to three paragraphs).

AP does not dispute that DOD followed the proper procedures in classifying the information withheld. See Opp. at 15-18; DOD's Opening Memorandum of Law ("Mem.") at 8. Substantively, AP's arguments are confined to "background facts" withheld from the sample pre-ARB transfer/release documents. See Opp. at 15, 17-18. AP makes no argument concerning DOD's withholding of analytical conclusions under Exemption 1. See id. at 15-18; Mem. at 8-11. AP has therefore abandoned any challenge to those withholdings. See Diaz v. Weill Med. Ctr., No. 02 Civ. 7380(AJP), 2004 WL 285947, at *20 (S.D.N.Y. Feb. 13, 2004) (claim abandoned where not addressed in brief opposing summary judgment) (collecting cases), aff'd, 138 Fed. Appx. 362 (2d Cir. 2005).

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[1] AP does not challenge DOD's withholding of either the classified handwritten notation on the sample action memorandum or the list of intelligence databases in the sample CITF memorandum. See AP's Memorandum in Opposition ("Opp.") at 10 n.6.

With respect to the withholding of background information under Exemption 1, AP makes essentially two arguments, neither of which withstands scrutiny.

1. DOD Has Not Officially Released the Specific Classified Information Withheld From the Sample Pre-ARB Documents

AP wrongly contends that DOD has previously released the background information withheld from the sample documents, either in the list of detainees that DOD produced to AP on May 15, 2006,[2] or in the CSRT and ARB transcripts and related documents. See Opp. at 17-18. It is well established, however, that the protection of Exemption 1 is waived by prior disclosure only when the agency "has officially disclosed the specific information the requester seeks." Halpern v. FBI, 181 F.3d 279, 294 (2d Cir. 1999) (emphasis added), quoted in Opp. at 17; see also, e.g., Assassination Archives and Research Ctr. v. CIA, 334 F.3d 55, 61 (D.C. Cir. 2003) (FOIA exemptions not waived where plaintiff failed to make "specific showing" that any official disclosures revealed information "as specific as" the information requested (emphasis in original)). Here, although DOD has released the names of and basic biographical information about the detainees held by DOD at Guantanamo, it has not identified which detainees were transferred or released from Guantanamo through a pre-ARB review process, nor the classified reasons for their transfer or release, as AP implicitly concedes. See Opp. at 2-3. Thus, DOD has not waived the protection of Exemption 1 through prior official disclosure of the "specific information" at issue. AP's related argument that DOD supposedly released similar "types of facts" in the CSRT and ARB transcripts, see id. at 18, fails for the same reason.

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[2] AP inaccurately states that DOD released the list of all detainees held by DOD at Guantanamo "[u]nder Order of this Court." Opp. at 1; see also id. at 8. DOD produced that list at the outset of AP III, before the Court issued any rulings in that case. AP's statement that the detainees at Guantanamo have been held "*incommunicado*," Opp. at 2, is also incorrect. As set forth in the record submitted in AP II, the International Committee of the Red Cross has been granted access to the Guantanamo facility and the detainees being held there since early 2002, and has transmitted communications known as "Red Cross Messages" between the detainees and their families. See Supplemental Declaration of Karen L. Hecker dated March 13, 2006 ("Supp. Hecker Decl.") ¶¶ 6-7 & Exh. E. Many of the detainees are also represented by and permitted to communicate with and be visited by counsel. See id. ¶ 14 & Exh. I.

AP's argument also fails to recognize a critical distinction between the information previously produced by DOD and the information withheld from the sample pre-ARB documents: none of the released information was classified. To the contrary, DOD redacted all classified information from the ARB documents before producing them to AP, which redactions AP (appropriately) did not challenge. See Declaration of Sarah S. Normand dated February 22, 2006 ("Normand Decl.") ¶ 5. Unlike the information released previously, the background information in the sample pre-ARB documents is, and always has been, classified. Harris Decl. ¶ 14.

The CSRT and ARB documents are also inapposite because, in those contexts, DOD engaged in a lengthy and painstaking intra- and inter-agency process of creating unclassified factual documents that could be provided to the detainees, so that portions of the proceedings could be held in an unclassified setting. See Third Supplemental Declaration of Karen L. Hecker dated September 26, 2006 ("Third Supp. Hecker Decl.") ¶ 3 (describing process of creating unclassified summary documents). Here, by contrast, DOD has not created unclassified versions of the pre-ARB documents, nor is DOD required to create such documents to satisfy AP's FOIA request. See Students Against Genocide v. Dep't of State, 257 F.3d 828, 837 (D.C. Cir. 2001).

2. DOD Has Met Its Burden of Showing That Disclosure of the Classified Background Information Withheld From the Sample Pre-ARB Documents Reasonably Could Be Expected to Cause Harm to National Security

AP's second argument regarding the Exemption 1 withholdings fares no better. AP speculates that "factual biographical information about a detainee contained in a document authorizing a detainee's release, standing alone, would not likely reveal critical intelligence or sources, nor in many instances would the disclosure of the circumstances of a detainee's capture by DOD or his conduct in captivity." Opp. at 18. AP's conjecture, however, is belied by the factual record in this case. As explained by Admiral Harris, the Commander of JTF-GTMO and the Original Classification Authority, if the withheld background information were publicly released, it would reveal (1) "critical details" about intelligence the U.S. Government has gained about the detainee and his involvement in the Global War on Terrorism, including, among other things, how the detainee became affiliated with the Taliban, al Qaeda, or associated forces, the detainee's training, and the detainee's actions in support of those organizations, and (2) the sources of such intelligence, which may include the detainee himself, other detainees, or other individuals. Harris Decl. ¶¶ 14, 16, 18.

For example, in the case of the detainee at issue in the sample JTF-GTMO and CITF memoranda, the withheld background information would reveal the organization that recruited the detainee to leave his home country in order to travel to Afghanistan to fight against the United States, the training he received in Afghanistan, the specific hostile actions he took while in Afghanistan, and how he was captured, as well as the fact that the detainee himself served as the source of certain intelligence information about the organization that recruited him into fighting jihad against the United States and about his involvement with the Taliban. Id. ¶¶ 14, 18. Release of such information, Admiral Harris explains, could reasonably be expected to compromise national security by revealing both the substance and sources of intelligence information gathered by the U.S.

Government regarding organizations that are engaged in hostilities against the United States or its coalition partners. See id. ¶¶ 16-22; Mem. at 8-11.

Thus, DOD has demonstrated logically and in substantial detail both how the Government's concerns about protecting intelligence sources and methods apply generally to background facts in the pre-ARB transfer/release documents, and how those concerns apply specifically to the information redacted from the sample documents. AP's ipse dixit to the contrary, see Opp. at 18, does not undermine this showing, which easily satisfies Exemption 1, particularly in light of the deference owed to DOD's expert judgments regarding the potential harms of disclosure to national security. See Mem. at 7-8 (citing cases). Additionally, the classified declaration of Dr. Stephen A. Cambone, Under Secretary of Defense for Intelligence, submitted for the Court's review ex parte and in camera, provides further support for DOD's withholdings under Exemption 1. Although DOD is constrained in its ability to describe the contents of Dr. Cambone's declaration on the public record, the declaration is responsive to points raised by AP.

B. Exemption 2 Protects Information That Would Reveal Internal DOD Guidelines for Assessing the Intelligence and Law Enforcement Value and Threat Level of Individual Detainees

Equally unpersuasive is AP's challenge to DOD's withholdings under Exemption 2. See Opp. at 20-21 (specific argument contained in single paragraph). AP nowhere disputes DOD's showing that the information withheld under Exemption 2 -- (1) conclusions reached by analysts regarding the intelligence and law enforcement value and threat level of detainees, and (2) information regarding the status of CITF's law enforcement investigation, see Harris Decl. ¶ 26; Smith Decl. ¶ 13[3] -- is "predominantly internal." See Opp. at 18-21; Mem. at 13-14. Nor does AP contest DOD's showing that information concerning the status of CITF's law enforcement investigation may risk circumvention of agency counterterrorism practices. See id. at 18, 20-21 (discussing only withholding of assessments prepared by JTF-GTMO and CITF); Mem. at 13-16. In fact, the Court need not even reach the Exemption 2 issue, as the assessments withheld under Exemption 2 were also withheld under Exemption 1, and AP has not challenged the withholding of assessments under Exemption 1. See supra at 2.

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[3] DOD also withheld the full Internment Serial Numbers of detainees under Exemption 2, see Harris Decl. ¶ 31, but AP does not contest that withholding, see Opp. at 10 n.6.

AP's sole argument under Exemption 2 is that DOD supposedly failed to show that disclosure "would actually risk disclosure or circumvention" of internal agency rules or practices. Opp. at 20. AP's argument misperceives the applicable standard. The Second Circuit has held that information is exempt under high 2 if its disclosure "may risk circumvention" of an agency rule or practice. Caplan v. Bureau of Alcohol, Tobacco & Firearms, 587 F.2d 544, 548 (2d Cir. 1978) (emphasis added). This standard is satisfied where disclosure of the information at issue has "the potential" to "significantly assist those engaged in criminal activity by acquainting them with the intimate details of the strategies employed in their detection." Id. at 547; see also cases cited in Mem. at 15-16.

Here, DOD's declarations explain that disclosure of the information withheld under Exemption 2 would reveal internal agency guidelines for assessing the intelligence and law enforcement value and threat level of particular detainees, thereby harming the Government's ability to gather intelligence and law enforcement information for use in the Global War Against Terrorism. See Harris Decl. ¶ 26; Smith Decl. ¶ 12. Common sense also supports DOD's position. It cannot seriously be disputed that the public release of information concerning specific criteria or factors routinely considered by DOD intelligence and law enforcement analysts in deciding whether to recommend transfer or release of particular detainees could reasonably be expected to assist terrorists, e.g., by helping them tailor their behavior in the event of capture to maximize the likelihood of release. There is therefore no genuine dispute that DOD properly withheld such information from the sample pre-ARB transfer/release documents under Exemption 2.

C. The Information Withheld From the Sample Pre-ARB Documents Under Exemption 5 Reflects Core Deliberative Processes[4]

AP's arguments regarding the recommendations withheld from the sample pre-ARB documents are similarly without merit.

1. There Is No Evidence That the Deputy Secretary of Defense Adopted the Reasoning of the Recommendations in the Sample Action Memorandum

AP cannot credibly dispute that the sample action memorandum is predecisional and deliberative. The document summarized analysis and recommendations by DOD components and other agencies, and was provided to the Deputy Secretary to assist him in deciding whether to transfer or release specific detainees. See Stimson Decl. ¶¶ 5-6; Mem. at 18-20. Instead, AP attempts to argue that an exception to the deliberative process privilege applies because, according to AP, the memorandum was "approved as recommended," constituted the Deputy Secretary of Defense's "findings of fact and conclusions of law," and was therefore "adopted" by DOD. Opp. at 13.[5] This characterization of the document is blatantly at odds with the factual record.

In determining whether to transfer or release particular detainees, the Deputy Secretary did not incorporate, or even refer to, any portion of the memorandum; he merely wrote his initials and the date next to the decision he reached. See Stimson Decl., Exh. 1, at 4 ("Approve __ PW 7/14/04"). As result, the sample action memorandum reveals nothing about the reasons for the Deputy

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[4] AP does not challenge DOD's withholding of information under the attorney client or work product privileges. See Opp. at 10 n.5, 12-14.

[5] AP does not advance this argument as to the sample JTF-GTMO or CITF memoranda, or the DA worksheet. See Opp. at 12-14.

Secretary's decision. Indeed, the recommendations from various components and agencies at times conflicted with one another, making it even more impossible to infer what reasoning the Deputy Secretary actually relied on in making his decision. See Stimson Decl. ¶ 6; Harris Decl. ¶ 28; Smith Decl. ¶ 17.

On these facts, there is no basis for inferring that DOD adopted the action memorandum. "[W]here an agency, having reviewed a subordinate's non-binding recommendation, makes a 'yes or no' determination without providing any reasoning at all . . . [the] court may not infer that the agency is relying on the reasoning contained in the subordinate's report." National Council of La Raza v. Dep't of Justice, 411 F.3d 350, 359 (2d Cir. 2005) (emphasis added); see also Renegotiation Bd. v. Grumman Aircraft Engineering, 421 U.S. 168, 185-86 (1975) (where agency merely approved or disapproved non-binding recommendations by regional board, without explaining reasons, agency did not adopt reasoning of regional board). AP even concedes as much. See Opp. at 13. "Rather, there must be evidence that an agency actually adopted or incorporated by reference the document at issue; mere speculation will not suffice." La Raza, 411 F.3d at 359 (emphasis in original); see also NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161 (1975) (for document to lose Exemption 5 protection agency must choose "expressly to adopt or incorporate [it] by reference").

In La Raza, the Second Circuit held that the Justice Department had adopted the reasoning of an internal, deliberative memorandum only after high-level agency officials repeatedly referred publicly to the memorandum's analysis as the basis for a change in Department policy. See La Raza, 411 F.3d at 358. It is therefore contrary to law for AP to argue, see Opp. at 13, that the absence of any reference by the Deputy Secretary to the analysis or recommendations provided to him somehow permits the Court to surmise what his rationale was. See Wood v. FBI, 432 F.3d 78, 84 (2d Cir. 2005) ("fatal" to adoption claim that "[t]here is no evidence in the record from which it could be inferred that" agency adopted reasoning of memorandum at issue, where decisionmaker merely noted on memo "'Declined JG for LJR 12/30/97'").

2. The Factual Material Withheld Under Exemption 5 Is Inextricably Linked to the Authors' Analyses and Recommendations

AP also argues that any facts contained in the documents at issue are beyond the scope of the deliberative process privilege. See Opp. at 14. As AP itself concedes in its one-paragraph treatment of this point, however, it is only "'purely factual material'" that is not protected. See Opp. at 14. Factual material is protected where it is "'inextricably intertwined' with the privileged opinions and recommendations such that disclosure would 'compromise the confidentiality of deliberative information that is entitled to protection under Exemption 5.'" Hopkins v. U.S. Dep't of Housing and Urban Devel., 929 F.2d 81, 85 (2d Cir. 1991) (citation omitted).

That is indisputably the case here. Of necessity, facts concerning the detainees' involvement in the Global War on Terrorism are central to, and inseparable from, analysis regarding whether they should be released from or continue in detention. In the sample JTF-GTMO memorandum, for example, the background sections -- each of which is no more than a paragraph -- contain "analytical conclusions drawn by JTF-GTMO personnel regarding the detainee." Harris Decl. ¶ 6; see also Smith Decl. ¶ 7 (background information regarding detainees in CITF memorandum includes analytical conclusions).

In addition, disclosure of factual material would reveal the authors' respective judgments as to what facts they believed relevant to the Deputy Secretary's decision to transfer or release particular detainees. Those judgments themselves reflect a deliberative process protected by the privilege. See, e.g., Mapother v. U.S. Dep't of Justice, 3 F.3d 1533, 1538-39 (D.C. Cir. 1993) ("[T]he selection of the facts thought to be relevant clearly involves 'the formulation or exercise of . . . policy-oriented judgment.'" (emphasis and citation omitted)).

In analogous circumstances, the Second Circuit held that factual material included in subordinates' analyses and recommendations was properly withheld under Exemption 5:

> [T]he documents in the instant case [intra-agency memoranda summarizing NLRB employees' analysis and giving recommended dispositions of NLRB cases] are so short -- from one to six pages -- that stripping them down to their bare-bone facts would render them either nonsensical or perhaps too illuminating of the agency's deliberative process.

Local 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1988). Similarly here, the Court should reject AP's argument that "purely factual material" could reasonably be extracted from predecisional, deliberative intra-agency memoranda ranging from one to four pages in length.

D. The Detainees' Privacy Interest in Non-Disclosure of Their Cooperation with U.S. Intelligence-Gathering Is Protected by Exemption 6

AP argues that detainee identifying information in the sample pre-ARB transfer/release documents is not protected by Exemption 6 because DOD has not shown that a risk of harm exists in particular cases, and the Court rejected a categorical approach to Exemption 6 balancing in AP I . See Opp. at 14-15. This argument fails to grapple with the significant additional evidence DOD has offered since AP I demonstrating the potential harm to detainees and their families that reasonably could be expected to result from disclosure of their identifying information in conjunction with the details of their cooperation with United States intelligence-gathering.

The Commander of JTF-GTMO has stated that such disclosure would place the detainee at significant risk of reprisals because it would reveal that a particular detainee was the source of intelligence. See Harris Decl. ¶ 18; Second Supplemental Declaration of Karen L. Hecker dated August 22, 2006 ("Second Supp. Hecker Decl.") ¶ 11. Indeed, detainees have specifically voiced concerns about reprisals against themselves and their families as a result of their cooperation or perceived cooperation with the U.S. Government. See id. ¶ 21. The Declarations of Joint Intelligence Group head Paul Rester, submitted in AP III and incorporated by reference in the instant motion, see Mem. at 11 n.9, also describe the likelihood of reprisals against detainees who have cooperated or are perceived to have cooperated with the United States. See, e.g., Second Supplemental Declaration of Paul B. Rester dated July 8, 2006 ("Second Supp. Rester Decl.") ¶¶ 9a-e, 11, 13a-c; Declaration of Paul B. Rester dated May 10, 2006 ¶¶ 5, 7. The ICRC -- long recognized internationally for its neutrality -- has also expressed concerns that public disclosure of personal information about detainees "could adversely impact the safety or security" of anyone whose name or information is mentioned. Supp. Hecker Decl. ¶¶ 5-8 & Exh. A. AP simply ignores this evidence, which refutes its claim that DOD's concerns of harm are speculative. See Opp. at 14, 15.[6]

Moreover, the Court's rejection of categorical balancing in AP I does not dictate the same conclusion here. See Opp. at 15. That rejection was grounded in the Court's view that detainees did not have a reasonable expectation of privacy in the identifying information they voluntarily provided "to a quasi-judicial tribunal," which visibly recorded their testimony and did not promise confidentiality, and which members of the press could attend. AP I, 410 F. Supp.2d 147, 156 & n.1 (S.D.N.Y. 2006). The communications reflected in the sample pre-ARB transfer/release documents have none of these attributes.

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[6] The Court's reliance on Samson v. California, 126 S. Ct. 2193 (2006), and Hudson v. Palmer, 468 U.S. 517 (1984), in its September 20, 2006 Opinion and Order ("September 20 Order"), to conclude that detainees have a minimal privacy interest in identifying information in DOD's investigative records relating to allegations of abuse, see September 20 Order at 7-10, should not affect the Exemption 6 analysis here. Identification of detainees in records documenting alleged misconduct at Guantanamo typically would not reveal that a detainee may have cooperated with the U.S. Government -- the concern at the heart of DOD's assertion of Exemption 6 as to the detainee identifying information in the sample pre-ARB transfer/release documents. Thus, while disclosure of identifying information in the alleged abuse documents is at odds with Exemption 6's purpose of protecting "the individual interest in avoiding disclosure of personal matters," U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762 (1989), see also id. at 762 n.13 ("The question of the statutory meaning of privacy under FOIA is, of course, not the same as . . . the question whether an individual's interest in privacy is protected by the Constitution."), it does not raise the same concerns of potential harm as worldwide dissemination of identifying information in the sample pre-ARB documents.

Here, furthermore, the detainees' privacy interest is in not making known to the world their cooperation with United States intelligence-gathering. Unlike in the CSRT context, the detainees' privacy interest in documents evidencing their cooperation with the U.S. Government is rooted partly in their expectation that the U.S. Government will maintain their anonymity. See Harris Decl. ¶¶ 20, 21; see also Second Supp. Rester Decl. ¶ 14 (alleviating detainees' fears of reprisals is essential part of developing human intelligence and "is typically accomplished by assuring detainees that their identities and the fact that they've cooperated will be kept confidential"); Supplemental Declaration of Paul B. Rester dated June 3, 2006, submitted in AP III, ¶ 8; U.S. Dep't of State v. Ray, 502 U.S. 164, 177 (1991); cf. AP I, 410 F. Supp.2d at 150 (singling out absence of promise of confidentiality as a key factor in concluding detainees had no privacy interest in CSRT documents).

The detainees' expectation of anonymity, coupled with the likelihood of reprisals, render a categorical approach appropriate in assessing the privacy interest of detainees who have cooperated or are perceived to have cooperated in U.S. intelligence-gathering, because for these detainees, "the balance characteristically tips in one direction." Reporters Comm., 489 U.S. at 776; see also Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 894 (D.C. Cir. 1995) (categorical balancing appropriate where "substantial privacy interest" exists). The detainees' substantial privacy interest in avoiding public disclosure of their cooperation with the U.S. Government outweighs any arguable public interest in the largely unspecified questions AP claims disclosure would answer, see Opp. at 15, particularly given that DOD has already informed the public of the fact that detainees are being released or transferred, and the countries they are being sent to. See Supp. Hecker Decl. ¶ 9 & Exhs.

F, G, H; Mem. at 25-26.

POINT II

THE COURT'S SEPTEMBER 20, 2006 OPINION AND ORDER DOES NOT SUBSTANTIALLY IMPACT THE ISSUES IN DISPUTE IN THIS MOTION

The September 20 Order, which addressed, among other things, decisional documents generated through the ARB process, only narrowly impacts DOD's withholdings from the sample pre-ARB decisional documents that are the subject of the instant motion.

The September 20 Order does not affect DOD's withholdings from the sample pre-ARB documents under Exemption 1, as none of the withholdings in dispute in AP II involved Exemption 1. DOD did withhold information from the ARB decisional documents pursuant to Exemption 1. See Declaration of Karen L. Hecker dated February 22, 2006 ("Hecker Decl.") ¶ 5f n.6; see also, e.g., Third Supp. Hecker Decl., Exh. A. However, AP did not challenge the redactions taken pursuant to Exemption 1, see Normand Decl. ¶ 5; Supplemental Declaration of Sarah S. Normand dated March 13, 2006 ("Supp. Normand Decl.") ¶ 4, and accordingly the September 20 Order did not address them.[7] Further, although the September 20 Order addressed the withholding of detainee identifying information under Exemption 6, the identities of enemy combatants who departed Guantanamo under a pre-ARB process have been withheld from the sample pre-ARB documents pursuant to Exemption 1, as well as Exemption 6. See Harris Decl. ¶ 14; Second Supp. Hecker Decl. ¶¶ 10-11; see generally Cambone Decl. Thus, DOD's withholding of detainee names and other identifying information from the pre-ARB documents is not governed by the September 20 Order.

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[7] The statement in the September 20 Order that "the action memoranda have in fact already been disclosed to AP, with only the detainee identifying information redacted," September 20 Order at 16, is incorrect. See Hecker Decl. ¶ 5f n.6. As illustrated by the sample ARB decisional document annexed as Exhibit A to the Third Supplemental Hecker Declaration, submitted herewith, substantial information other than detainee names was redacted from the ARB decisional documents, pursuant to Exemptions 1, 5, and 6. AP challenged only the withholdings of detainee identifying information under Exemption 6.

The September 20 Order does not affect DOD's withholdings from the sample pre-ARB documents under Exemption 2, as none of the withholdings in the ARB documents were taken pursuant to that exemption.

With regard to Exemption 5, the September 20 Order would apply to DOD's withholding from the sample pre-ARB documents of the identifying information of approximately 12 detainees whom the Deputy Secretary of Defense determined through a pre-ARB process could be transferred or released, but who have not yet departed Guantanamo because appropriate transfer assurances have not been obtained from the receiving governments. See Mem. at 22 n.13; Second Supp. Hecker Decl. ¶ 13.[8] But the September 20 Order does not apply to DOD's withholding of intra- and inter-agency recommendations and advice to the Deputy Secretary of Defense concerning whether particular detainees should be released, transferred, or continued in detention. See Mem. at 17-22. DOD withheld similar recommendations from the ARB decisional documents. See Hecker Decl. ¶ 5f n.6. As the Court observed in its September 20 Order, however, those withholdings were not challenged by AP. See September 20 Order at 13 n.3 (citing Normand Decl. ¶ 5 and Supp. Normand Decl. ¶ 4). Thus, the September 20 Order does not address the propriety of DOD's withholding of intra- or inter-agency recommendations under Exemption 5.

Likewise, the September 20 Order does not foreclose DOD's arguments with regard to the withholding of detainee identifying information from the sample pre-ARB documents under Exemption 6. As explained supra at 10-11, the factual record submitted with the instant motion provides substantial support for DOD's judgment that release of detainee identifying information --

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[8] This information, in any event, is covered by Exemption 1 and thus would not be releasable under the September 20 Order.

particularly in connection with documents identifying the detainee as the source or potential source of intelligence information about al Qaeda, the Taliban, or other organizations engaged in hostilities against the United States and its coalition partners -- is likely to place the detainees and their family members at significant risk of harassment, retaliation and harm. Accordingly, the Court's ruling with regard to the withholding of detainee identifying information from the ARB decisional documents under Exemption 6, which was based on the Court's conclusion that DOD had submitted an insufficient record that disclosure would subject the detainees and their family members to harm, see September 20 Order at 18, is not controlling with regard to DOD's Exemption 6 claims in the instant motion.

POINT III

WHILE IT IS UNNECESSARY IN LIGHT OF DOD'S DECLARATIONS, DOD DOES NOT OPPOSE IN CAMERA REVIEW

Finally, AP asks the Court to review the sample documents in camera, speculating that some non-exempt material may be segregable. See Opp. at 22. While DOD's comprehensive and detailed declarations make in camera review unnecessary, see Local 3 v. NLRB, 845 F.2d at 1180 (rejecting request for in camera review because agency's "detailed affidavit was sufficient"); Vaughn v. United States, 936 F.2d 862, 869 (6th Cir. 1991) (in camera review "neither favored nor necessary where other evidence provides adequate detail and justification"), DOD does not oppose in camera review of the sample documents.

CONCLUSION

For the foregoing reasons, and the reasons stated in DOD's opening memorandum of law and supporting declarations, the Court should grant DOD's motion for summary judgment with respect to its withholdings in the sample pre-ARB transfer/release documents.

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Respectfully submitted,

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
Attorney for Defendant

By: s/ Sarah S. Normand
SARAH S. NORMAND (SN-2834)
ELIZABETH WOLSTEIN (EW-5194)
Assistant United States Attorneys
86 Chambers Street
New York, New York 10007
Telephone: (212) 637-2709/2743
Facsimile: (212) 637-2702/2686